**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**WINDING UP CAUSE NO. 18 OF 2015**

**IN THE MATTER OF MITTS ELECTRICAL COMPANY LIMITED**

**AND**

**IN THE MATTER OF:**

**UNITED BANK OF AFRICA (KENYA) LIMITED……PETITIONER/RESPONDENT**

**RULING**

1. On 10th April 2015 the Petition was filed by **UBA KENYA BANK LIMITED.** The Winding – Up petition was targeting **MITTS ELECTRICAL COMPANY LIMITED.**

2. The petitioner's position was that company was insolvent and incapable of paying its debts. Therefore, the petitioner intends to persuade the court that it was just and equitable to wind-up the company.

3. When the company became aware of the petition, it quickly filed an application dated 19th May 2015, seeking an injunction to restrain the petitioner from advertising the petition. Secondly, the company asked the court to strike out the petition as it was an abuse of the process of the court.

4. The basis upon which the injunctive relief was sought was that because a hearing date had been scheduled for the petition, it was expected that the petitioner would soon cause the petition to be advertised, as is required by the Winding-Up Rules.

5. The company was very concerned about the impending advertisement of the petition because such an advertisement was likely to severely and irreparably injure and damage the company's character, credit, goodwill and reputation.

6. Secondly, the company was of the view that the debt cited in the petition was un-ascertained, contentious and substantially disputed by the company.

7. The company gave particulars of two cases between it and the petitioner, in which the prayers sought in the petition were said to be directly and substantially in issue. As those cases were still pending before the court, the company asserted that it was premature for the petitioner to file a winding-up petition, targeting the company.

8. The other contention of the company was that the petitioner had failed to provide security as envisaged by Rule 22 (3). In the light of that failure, the company asked the court to strike out the petition.

9. Another failure attributed to the petitioner was the absence of the seal of the court, on the petition. Such failure is said to constitute a bar to the petition moving forward.

10. In my understanding, the petitioner does not have the responsibility of affixing the seal of the court to the petition. Therefore, if the seal was lacking from the petition, that cannot be held against the petitioner. Such a failure would have to be placed at the door of the learned Deputy Registrar.

11. As regards the requirement that some money be deposited with the Official Receiver to cover the expenses and fees to be incurred by the Official Receiver, Rule 22 (3) of the **Companies *(Winding-Up)* Rules**, stipulates that the Court will not accept a petition unless there is proof that the money had been deposited.

12. I perused the court file in this matter and verified that the petitioner made available to the learned Deputy Registrar, the original receipt for Kshs. 20,000/- which was deposited with the Registrar General.

13. On a *Prima facie* basis, therefore, the petitioner met the requirements for the lodging of the petition. This finding is in relation to issues concerning the affixation of the court seal on the petition, and the payment of monetary deposit to the Official Receiver.

14. The petitioner agrees with the company, concerning the circumstances in which a winding-up order may not be made. In that regard, I will quote from the petitioner's submissions as follows;

> **"…it is trite law and as restated in the Halsbury's Laws of England, 4th Edition, Vol.7 (3) 2004 reissue, at paragraph 452 which states;**
>
> > **'A winding up order may not be made on a debt which is disputed in good faith by the company; the court must see that the dispute is based on a substantial ground. A dispute as to the precise amount due is not a sufficient answer to the petition. If there is a genuine dispute, the petition may be dismissed or stayed, and an injunction may be granted restraining the advertisement or publicizing of the petition. Where a petition has not been presented but is threatened in respect of an disputed debt, an injunction may be granted restraining the presentation. If the debt is genuinely disputed on some substantial ground, the court may decide this question on the petition, but it will usually dismiss a petition grounded on a disputed debt and leave the dispute to be decided in an action (or claim). The court may order the amount of the alleged debt to be paid into court. Where the judgement for the debt on which the petitioner is presented is reversed before the hearing, the petition may be dismissed. It is an abuse of the process for a petition to be presented on the basis of an unascertained debt which has never been demanded and for which no opportunity to repay has been given".**

15. In a nutshell, when there is a genuine and substantial dispute about the debt which is the foundation upon which a winding up petition is founded, the court may stay or may dismiss the petition.

16. The company asserts that it has a genuine and substantial dispute about the debt. It points out that there are two cases which it has filed against the petitioner, addressing the subject matter of the petition. Those 2 cases are;

a. **MITTS ELECTRICAL COMPANY LIMITED Vs UNITED BANK of AFRICA (KENYA) LIMITED, HCCC NO. 171 OF 2014; AND**
b. **MITTS ELECTRICAL COMPANY LIMITED Vs UNITED BANK of AFRICA (KENYA) LIMITED, CIVIL APPLICATION No. NAI. 303 of 2014.**

17. According to the company, the case before the High Court was still pending, and that the petitioner had reserved its right to file a counter-claim against the company.

18. But the petitioner points out that the existence of the court cases should not be construed to mean that the company was legitimately disputing the debt it owes the petitioner.

19. The company had, severally made proposals to restructure the debt or to assign the proceeds from the various contracts it was performing.

20. In the circumstances, the petitioner insists that the company does not, in principle, dispute the debt. It was only seeking more agreeable ways of settling the debts, whilst remaining financially viable.

21. The petitioner invited this court to peruse the prayers sought by the company in **MITTS ELECTRICAL COMPANY LIMITED Vs UBA BANK KENYA LIMITED, HCCC NO. 171 OF 2014,** so as to appreciate that the sole purpose of that case was to try and stop the petitioner from realizing the outstanding loan amounts.

22. I have not perused the pleadings in that case because I would not want to have a situation in which the court makes any comments about issues which were pending in a different case.

23. If, as was pointed out by the petitioner, the court had already dismissed the company's quest for an interim injunction in that other case; and if the said dismissal was because the company had not demonstrated a prima facie case with a probability of success, consequences should follow in that case.

24. The consequences, as the petitioner pointed out, included an appeal by the company to the Court of Appeal.

25. The company did lodge an application at the Court of Appeal. The said Application, **MITTS ELECTRICAL COMPANY LIMITED Vs UNITED BANK OF AFRICA (KENYA) LIMITED CIVIL APPLICATION No. 303 of 2014,** was dismissed on 28th May 2015. The dismissal happened when the Applicant failed to attend court to prosecute its application.

**Does that mean that the issue of the company's indebtedness had been determined by the court?**

26. It must be borne in mind that the High Court had, so far, only dealt with the interlocutory application. The substantive suit is still pending.

27. Therefore, at the moment, it cannot be said that there is already a substantive determination of the matters in issue in the case between the parties.

28. The fact that the company had failed, at the interlocutory stage, to demonstrate that it has a *prima facie* case with a probability of success, is not, of itself a final determination.

29. It would appear that the petitioner is convinced that the cases filed by the company had no merits. That is why the petitioner insists that the company definitely owes it money. In that regard, the petitioner may or may not be right, because the final decision will be made by the court.

30. In the circumstances, it may be prudent for the petitioner to move the court, so that a determination is made in the cases. It is then that the petitioner would be on solid ground, to insist that the company was definitely indebted to the petitioner, if the court will have held in favour of the petitioner.

31. If the court grants judgement in favour of the petitioner, in those other cases, that would have brought finality to the question as to whether or not the company is indebted to the petitioner.

32. But until there was either an express and unequivocal admission of indebtedness by the company, or a

final judgement in favour of the petitioner, the assessment of the facts, by the respective parties is nothing more than their respective opinions on the matter.

33. Such opinions may be well founded and plausible, but they do not constitute determinations which are binding on the parties.

34. And even after the creditor obtained judgement against a debtor, it would be expected that the creditor would then take steps to execute the Decree.

35. Winding-Up proceedings were never intended to be a process or a procedure for use by a Decree-Holder to recover the decretal amount owed to him.

36. On the other hand, I equally appreciate the petitioner's concerns that;

> ***"This Honourable Court cannot be used as a shield to offer protection to a debtor who has failed to honour its obligations for close to three years".***

37. But then again, the only obligations that the court is concerned with in a winding-up cause, is the obligation to pay debts to the petitioner. If it were established that the company was insolvent, this court would not hesitate to order that it be wound-up.

38. The fact that the claim is in respect to a debt which is alleged to have been outstanding for nearly 3 years old, is not sufficient ground to warrant the commencement of winding-up proceedings.

39. The basis upon which a petition to wind-up a company can be properly founded is the insolvency of the company.

40. In this case, the company insists that its assets were of a value that was far in excess of the sums claimed by the petitioner. The petitioner has not challenged that statement directly.

41. I appreciate the practical difficulty which the petitioner would encounter in trying to prove that the asset base of the company was not as financially sound as asserted by the company.

42. Ordinarily, when a company or any person has ability to pay its debts, or his debts such ability would be demonstrated through conduct. In other words, the person would be making payments to the creditor.

43. Logically, therefore, when a person was not making payments to his creditor, it may be presumed that the person was either unable or unwilling to pay his debts.

44. By dint of the provisions of Section 219 (e) of the Companies Act, a company may be wound up if it was unable to pay its debts. That would imply that if a company was unwilling to pay its debts, even if it had the resources to do so, that would not be a ground for winding up the said company. However, Section 220 (a) of the Companies Act expressly makes it clear that when the company neglects to pay its debts after Notice is served upon it, that would constitute inability to pay debts.

45. In this case, the petition is based on Section 220 (c) which defines inability to pay debts as proof, to the satisfaction of the court, that the company was unable to pay its debts. Section 220 (c) proceeds to make the following statement;

> **"…in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company".**

46. I understand that to mean that the exact circumstances of the company must be taken into account by the court. It is not just the question as to whether or not the company has adequate cash resources to pay-off its debts.

47. In **RE: GOLD HILLS MINES (1883) CH D 20**, Bacon Vc stated as follows;

> **"The Act of Parliament has given a creditor who cannot get paid a right to present his petition against a company which not only refuses to pay him, but is in a state of insolvency. That is all the Act does. It does not countenance applications to wind up as a means of enforcing the payment of debts which the company disputes".**

48. From the evidence tendered before me, I find, on a *prima facie* basis, that the company is not insolvent. Therefore, the petitioner cannot be allowed to take further steps in the petition currently.

49. My considered view is that if the petition was gazetted or published in the media, the company would be highly prejudiced as its creditors may, in all probability, seek to recover their debts as quickly as possible, thus bringing the company to its knees.

50. When creditors come calling at the same time and the company is brought to its knees, it may never recover. In other words, the loss that the company would have suffered may be incapable of compensation by an award of damages.

51. In the circumstances, the justice of the case demands that an interlocutory do issue forthwith, to restrain the petitioner from taking further or other steps in the prosecution of the petition. In particular, the petitioner is hereby restrained from advertising the petition.

52. As the petition cannot proceed further without having been advertised, and because the petitioner has been restrained from advertising it, I hold the view that there would be no useful purpose to be served by sustaining the petition. Accordingly, I order that the petition be struck out.

53. Nonetheless, I order that each party should bear its own costs. I so order because, on a *prima facie* basis, it would appear that the company has frustrated the petitioner's attempts to recover whatever sums the company may be owing the bank. In other words, the conduct of the company appears to have been the catalyst for the action taken by the petitioner. In the circumstances, it would be inappropriate to appear to reward a party who seems to be in default. The striking out of the petition is sufficient rebuke to the petitioner.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** this **12th day** of **November** 2015.

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Maina for Deya for the Mitts Electrical Company Limited

Nyarang'o for the Petitioner/Respondent.

Collins Odhiambo – Court clerk.